

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY O'NEIL DAVIS,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 200285
Ingham Circuit Court
LC No. 96-069999 FH

Before: Talbot, P.J., and McDonald and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of malicious destruction of a building over \$100, MCL 750.380; MSA 28.612, for which he was sentenced to two years' probation, with the first six months to be served in the Ingham County jail, and was ordered to pay restitution in the amount of \$164.¹ We affirm.

I

This case stems from an argument between defendant and his girlfriend, Atalie Buycks, which turned physical, and resulted in a broken window in Buycks' home. Buycks testified that defendant used a snow shovel to break the window after she locked him out of the house. At trial, defendant claimed that the window broke when, during the argument, he pushed Buycks and she fell into the window.

II

On appeal, defendant claims that he was denied the effective assistance of counsel because his attorney did not make a reasonable effort to locate a witness who may have been able to impeach Buycks' testimony that she did not drink any alcohol prior to her argument with defendant. We reject this argument for two reasons.

First, there is insufficient evidence on the record to confirm defendant's claim that such a witness even existed, let alone that the subpoena mailed to the witness was returned as

undeliverable. See *People v Johnson (On Rehearing)*, 208 Mich App 137. 142; 526 NW2d 617 (1994) (In the absence of an evidentiary record regarding defendant's claims, this Court's review is limited to deficiencies apparent on the record).

Second, defense counsel's failure to call a witness is presumed to be a matter of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), and will not entitle a defendant to relief unless he is deprived of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Here, defense counsel vigorously challenged Buycks' credibility during his cross-examination of both her and other prosecution witnesses. Accordingly, defendant has failed to meet his burden of establishing that he was denied the effective assistance of counsel. See generally *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Affirmed.

/s/ Michael J. Talbot

/s/ Gary R. McDonald

/s/ Janet T. Neff

¹ Defendant was also charged with assault and battery, MCL 750.81; MSA 28.276; however, this charge was dismissed after the jury was unable to reach a verdict.